

Rule 7, Ariz. R. Crim. P.

BAIL AND BOND — Bond forfeiture under Rule 7.6(c), Arizona Rules of Criminal Procedure Revised 12/2009

Rule 7.6(c), Arizona Rules of Criminal Procedure, provides the procedure for forfeiting a defendant's bond when the defendant violates any condition of his appearance bond. That subsection requires notice to the parties and any surety, and a hearing, before the court may order that all or part of the bond be forfeited:

c. Forfeiture Procedure.

(1) Notice and Hearing. If at any time it appears to the court that the released person has violated a condition of an appearance bond, it shall issue a bench warrant for the person's arrest. Within ten days after the issuance of the warrant, the court shall notify the surety, in writing or by electronic means, that the warrant was issued. The court shall also set a hearing within a reasonable time not to exceed 120 days requiring the parties and any surety to show cause why the bond should not be forfeited. The court shall notify the parties and any surety of the hearing in writing or by electronic means.

(2) Forfeiture. If at the hearing, the violation is not explained or excused, the court may enter an appropriate order of judgment forfeiting all or part of the amount of the bond, which shall be enforceable by the state as any civil judgment.

Note that the court will issue a bench warrant for the released person's arrest if he violates any condition of his appearance bond, even if that violation is not itself a crime (for example, if the defendant leaves the jurisdiction), and even if the violation is not willful (for example, if the defendant is arrested on a warrant from another jurisdiction and held in custody so that he cannot appear in Arizona). See also *United States v. Vaccaro*, 51 F.3d 189, 192-93 (9th Cir. 1995) (rejecting the argument that forfeiture was only appropriate for a failure to appear and finding that forfeiture is

appropriate if the bond agreement provides that the bond will be forfeited for any violation of a release condition). The language of a bail-bond contract should be strictly construed in accordance with its terms. *State v. Veatch*, 132 Ariz. 394, 397, 646 P.2d 279, 282 (1982). Note also that nothing in the rule requires the court to give notice to the bail bond company that it has issued a bench warrant for the defendant's arrest, in part because giving notice might make it difficult to serve the warrant. *Matter of Bond Forfeiture in CR-94019213*, 191 Ariz. 304, 305-06, 955 P.2d 541, 542-43 (App. 1998).

Although bond forfeiture proceedings arise out of a criminal prosecution, they are civil in nature. Arizona cases have recognized the civil nature of bail bond forfeiture proceedings at least since *State ex rel. Ronan v. Superior Court*, 96 Ariz. 229, 230 **231**, 393 P.2d 919, 920 (1964), in which the Arizona Supreme Court stated, "It has generally been held that a proceeding for a forfeiture of bail is civil in its nature even though it originates in a criminal proceeding." See also *Gearing v. State*, 24 Ariz. App. 159, 160, 536 P.2d 1051, 1052 (App. 1975) ("It is . . . the rule in our state that a proceeding for forfeiture of a bail bond is a substitute for a civil suit by the County Attorney for breach of contract on the bail bond undertaking by the surety, even though the suit arises out of a criminal proceeding.") In *State v. Empire American Bail Bonds, Inc.*, 191 Ariz. 218, 953 P.2d 1271 (App. 1998), the court stated:

Although bond forfeiture proceedings occur within the context of a criminal case, they are civil in nature. *State v. Rogers*, 117 Ariz. 258, 259, 571 P.2d 1054, 1055 (App. 1977). Hence, the rules of civil procedure apply.

191 Ariz. at 220, 953 P.2d at 1273.

The Arizona Court of Appeals subsequently stressed the contractual nature of bail bonds:

The right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond The bail [bondsman] can surrender his principal before the bond is forfeited, and arrest him for that purpose without process. The state cannot.

State v. Affordable Bail Bonds, 198 Ariz. 34, 38 ¶ 17, 6 P.3d 339, 343 (App. 2000) (quoting *Fitzpatrick v. Williams*, 46 F.2d 40, 40-41 (5th Cir. 1931)). See also *State v. Rogers*, 117 Ariz. 258, 259, 571 P.2d 1054, 1055 (App. 1977), *superseded by rule on other grounds as stated in State v. Old West Bonding Co.*, 203 Ariz. 468, 56 P.3d 42 (App. 2002): “[F]orfeiture proceedings are a substitute for a civil action to enforce a breach of contract of the undertaking of the surety, and therefore are civil in nature.”

Federal case law also holds that bond forfeiture proceedings are civil matters. “Enforcement of a bond forfeiture, although arising from a prior criminal proceeding, is nevertheless a civil action.” *United States v. Vaccaro*, 51 F.3d 189, 191 (9th Cir. 1995) (citing *United States v. Plechner*, 577 F.2d 596, 597 (9th Cir. 1978)). The courts will enforce the terms of the bond agreement against both the bail bond company and the defendant personally. In *Vaccaro*, the defendant violated a term of his release conditions by committing a new crime and the district court ordered his bail bond forfeited. On appeal, both the bond company and the defendant contended that the district court erred by holding that they were jointly and severally liable for the bond amount. The Ninth Circuit rejected the arguments of the defendant and the bond company, stating:

The bond is a contract between the government and defendant, and should be strictly construed in accordance with the terms contained therein. The terms of the agreement clearly specified that Vaccaro could be held personally liable for the amount of the bond if conditions of release were violated and if the bond was declared forfeited.

Vaccaro, 51 F.3d at 193 [citation and internal quotation marks omitted]. Another Ninth Circuit case further reinforced the civil nature of bond forfeiture: “A bail bond is a contract between the defendant and his surety, the forfeiture of which results in the surety becoming the government’s debtor.” *United States v. Lujan*, 589 F.2d 436, 438 (9th Cir. 1978). “[C]ourts apply general principles of contract construction when interpreting bail bonds.” *United States v. Toro*, 981 F.2d 1045, 1047 (9th Cir. 1992).

The surety on a bail bond assumes the risk that the defendant will fail to appear and that the bond will be forfeited. *United Bonding Insurance Co. v. City Court*, 6 Ariz. App. 462, 464, 433 P.2d 642, 644 (1967). “When a defendant is absent at the appointed time, the State has the right to a forfeiture and the burden of proof rests with the surety to show reasonable cause” for the defendant’s failure to appear. *State ex. rel. Corbin v. Superior Court*, 2 Ariz. App. 257, 261, 407 P.2d 938, 942 (1965). Because forfeiture proceedings are civil cases, the bonding company bears the burden of proving by a preponderance of the evidence that the defendant has a reasonable excuse or explanation for the violation. *State v. Martinez-Gonzales*, 145 Ariz. 300, 302, 701 P.2d 8, 10 (App. 1985).

The Maricopa County Attorney’s Office Prosecution Policies and Procedures Manual, Procedure 4.2, revised 1/03, presumes that a bench warrant will be issued when a defendant fails to appear at the superior court level and recommends that when

the defendant fails to appear, the bond be forfeited even if the trial court does not issue a bench warrant. In *United Bonding Insurance Co.*, 6 Ariz. App. 462, 433 P.2d 642 (1967), the surety sought to have the bond amount returned to the surety because the trial court did not issue a bench warrant when the defendant failed to appear for trial. The Arizona Court of Appeals refused to allow the surety to recover the bond amount, reasoning that the prosecution was ready to proceed with trial when the defendant failed to appear and that the trial court was not obligated to issue a bench warrant at that time:

The very purpose of this bond was to assure the defendant's presence at the time of trial. We know of no law requiring the magistrate to issue a bench warrant under these circumstances, but, if this were his duty, we conceive that the proper remedy would be to compel the issuance of such a warrant by special writ application to a higher court, not to relieve the bonding company from its obligations on its bond.

United Bonding Insurance Co., 6 Ariz. App. at 464-65, 433 P.2d at 644-45.

Because of the civil contractual nature of bail bond agreements, a surety's agent can bind the surety to the bond agreement even when the agent has violated the surety's procedures for issuing bonds. In *United States Fidelity & Guaranty Co. v. State*, 6 Ariz. App. 85, 430 P.2d 431 (App. 1967), the surety's agent violated the bond company's rules by issuing a bail bond even though the defendant had not paid any bond premium or furnished any collateral. The defendant failed to appear for trial and the trial court forfeited the bond amount. The court of appeals upheld the trial court's order forfeiting the bond, stating, "Where a party clothes his agent with authority to act, that party is bound even though the agents acts [*sic*] in excess of his authority." *Id.* at 88, 430 P.2d at 434.

Money for fines due from the defendant may be deducted from cash appearance bonds that the defendant has furnished. Fines may also be deducted from bond money furnished to the defendant by third parties if the cash was a loan or a gift to the defendant, making it his property and thus subject to forfeiture. In *State v. Bailey*, 120 Ariz. 399, 586 P.2d 648 (App. 1978), the defendants were charged with drug offenses and posted cash appearance bonds. When they were convicted, the trial court imposed prison terms and fines and deducted the fines from the bond amounts they had posted. On appeal, the defendants claimed that the trial court violated their constitutional rights by deducting the fines from their bonds. The court of appeals disagreed, stating:

Appellants' contention that the trial court committed constitutional error in deducting their fines from their cash appearance bonds . . . is without merit. . . . At most on appeal they suggest the money for their appearance bonds may have been borrowed, making it none the less appellants' property when deposited on their behalf with the clerk of the court.

Bailey, 120 Ariz. at 401, 586 P.2d at 650. However, if the third party supplies the bond money but does not lend or give the bail money to the defendant, the third party's money may not be used to pay the defendant's fines. In *State v. Gutierrez Barajas*, 153 Ariz. 511, 738 P.2d 786 (App. 1987), the defendant's parents posted a \$7,000 cash appearance bond from their own funds to allow the defendant's release. The defendant pleaded guilty and was fined, and the trial court ordered that the amount of the fine be paid out of the bond money. The defendant asked the trial court to reconsider the order. At the resentencing hearing, the defendant's mother testified that the money belonged to the parents and that they did not give or loan the money to the defendant, but "merely posted it in order to obtain [his] release, with the understanding that the funds would be

returned to them when [he] appeared pursuant to his release order.” *Id.* at 512, 738 P.2d at 768. Nevertheless, the trial court deducted the amount of the fines from the bail money. On appeal, the court of appeals reversed the order deducting the fines because the trial court had found that the defendant complied with all conditions of his release. The court stated:

[W]here the evidence shows, as in this case, that the third party who provided the security or appearance bond did not make a loan to or bestow a gift upon the defendant, the bond may not be forfeited except by agreement or pursuant to Rule 7.6 for violations of the conditions of release.

Gutierrez Barajas, 153 Ariz. at 513, 738 P.2d at 788. The Court of Appeals ordered that all the bail money be returned to the parents because the bond agreement did not provide that the bond money would be used to pay fines and the defendant obeyed all the conditions of his release. *Id.*

When a case is dismissed and the prosecution terminates, the obligation on the bond ends, both for the defendant and for the surety. In *State v. Nunez*, 173 Ariz. 524, 844 P.2d 1174 (App. 1992), the defendants posted bond and later violated their release terms, and forfeiture hearings were set. However, the defense moved to suppress the evidence against the defendants and the trial court granted the motion suppressing the evidence. The State could not proceed without the evidence and moved to dismiss the indictments against the defendants. The trial court dismissed all of the charges with prejudice. The trial court then found it irrelevant that the indictments against the defendants had been dismissed and ordered the bonds forfeited, and the defendants appealed. The court of appeals rejected the State’s argument that the bond forfeiture proceedings were independent of the underlying criminal case and that the defendants

defaulted on their appearance bonds before the prosecution ended, citing *United Bonding Insurance Co. v. City Court*, 6 Ariz. App. 462, 433 P.2d 642 (1967). The Court of Appeals found that once the charges had been dismissed, the surety's obligations were at an end. Thus, the trial court should not have forfeited the bonds:

The primary purpose of an appearance bond is to assure the defendant's presence at the time of trial. The charges against appellants having been dismissed prior to trial indicates that there was no further need for their appearance bonds. The trial court was required by Rules 7.6(e) and 16.5(e) to exonerate appellants' appearance bonds.

Nunez, 173 Ariz. at 526, 844 P.2d at 1176 [citation omitted]. The Court noted that when *United Bonding* was decided, the rules required a forfeiture to be entered immediately upon a violation of an appearance bond, but Arizona law now requires a hearing before any bond forfeiture. Rule 7.6(c), Arizona Rules of Criminal Procedure "Since no forfeiture hearing was held prior to the dismissal of appellants' cases, they were entitled to have their bonds exonerated." *Nunez*, 173 Ariz. at 526, 844 P.2d at 1176.

Rule 7.6(c)(2), Arizona Rules of Criminal Procedure, states:

If at the hearing, the violation is not explained or excused, the court may enter an appropriate order of judgment forfeiting all or part of the amount of the bond, which shall be enforceable by the state as any civil judgment.

Rule 58(a), Arizona Rules of Civil Procedure¹, generally requires all civil judgments to be in writing and signed by a judge or commissioner, and requires the judgments to be

¹Rule 58(a), Ariz. R. Civ. Proc., provides in part:

Forms of judgment shall be served upon all parties and counsel. . . . [A]ll judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so.

served upon all parties and counsel. In *State v. Empire American Bail Bonds, Inc.*, 191 Ariz. 218, 953 P.2d 1271 (App. 1998), the bond company, Empire, posted bond for the defendant. The defendant failed to appear for a court date and the trial court issued a bench warrant for his arrest and set a bond forfeiture hearing. At the hearing, the trial court ordered the defendant's bond forfeited and directed the State to submit a written form of judgment to the court for the court's signature. The State then submitted a form of judgment and the trial court signed it. However, neither Empire nor Empire's counsel received any copy of the judgment until after the time to file a notice of appeal had elapsed. Empire requested the trial court to sign a new form of judgment so that Empire could appeal the forfeiture order, but the trial court refused to do so. On appeal, Empire argued that the requirement of service in Rule 58(a), Arizona Rules of Civil Procedure, applied to bond forfeiture proceedings. The court of appeals agreed, noting that Rule 58(a)'s service requirements were "designed to help prevent parties from losing their appeal rights, which is precisely what happened in this case." *Empire American Bail Bonds, Inc.*, 191 Ariz. at 220 ¶ 7, 953 P.2d at 1273. The court rejected the State's argument that the judgment was complete when orally pronounced and entered in the court's minutes and that Rule 7.6(d), Arizona Rules of Criminal Procedure, did not require the State to submit a written form of judgment. The court of appeals concluded that Rule 58(a), Arizona Rules of Civil Procedure, applies to bond forfeiture proceedings and requires forms of judgment to be served upon all parties and counsel. Since the State did not serve the form of judgment on Empire or its counsel, the forfeiture order was invalid.

